

# Domestic Abuse Offence and Domestic Violence Disclosure Scheme

Bar Council - Consultation Response

## Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar Council welcomes the opportunity to contribute to the Department of Justice's consultation on the creation of a specific domestic abuse offence and domestic violence disclosure scheme in NI. The Bar's response is structured according to our comments on the questions relating to the proposed domestic abuse offence outlined in the consultation document. We have no comment to make on the disclosure scheme.

### 1. Does the current law provide sufficient protection to victims of domestic abuse?

3. In 2014-15 the Police Service of Northern Ireland reported 28,287 domestic incidents and 13,426 domestic crimes; these are the highest recorded levels since 2004-05. There were 6 murders with a domestic motivation, representing 37.5% of all murders during this period, along with 449 sexual offences and 176 rape offences with a domestic motivation.<sup>1</sup> These statistics show that domestic and sexual violence and abuse remain prevalent across society in NI despite considerable progress in recent years in increasing the number of convictions linked to such offences.
4. It is worth noting that there are a range of offences already in existence for dealing with the behaviours associated with domestic violence and abuse. The law already makes it clear that violence in a domestic context is a criminal act which is captured by way of offences which also apply in a non-domestic setting, such as common assault, assault occasioning actual bodily harm, wounding with

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<sup>1</sup> Police Service of Northern Ireland, 'Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2014/15', August 2015, at [https://www.psnipolice.uk/globalassets/inside-the-psni/our-statistics/domestic-abuse-statistics/domestic\\_abuse\\_incidents\\_and\\_crimes\\_in\\_northern\\_ireland\\_2004-05\\_to\\_2014-15.pdf](https://www.psnipolice.uk/globalassets/inside-the-psni/our-statistics/domestic-abuse-statistics/domestic_abuse_incidents_and_crimes_in_northern_ireland_2004-05_to_2014-15.pdf) (last accessed 06 April 2016)

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intent to cause grievous bodily harm, sexual assault and rape. Offences also extend to non-physical violence where there is a threat of imminent violence. Meanwhile the Protection from Harassment (Northern Ireland) Order 1997 covers non-violent coercive and controlling behaviour. However, this does not explicitly apply to coercive and controlling behaviour in intimate relationships.

5. The Bar also welcomes progress in recent years to improve the general public's understanding and knowledge of the criminal justice system. This includes recent steps taken to promote the protection of victims with the publication of the Victim Charter in January 2015 which has subsequently been placed on a statutory footing under the Justice Act (Northern Ireland) 2015 and sets out the standards of service and entitlements that a victim of crime can expect to receive from a range of service providers. Protection and justice for victims clearly remains an important aspect of combatting domestic violence and abuse but it is important when creating new offences to be mindful of the need to address any concerns which victims may already have in accessing the criminal justice system. Victims often fear the consequences for their families of reporting abuse to the police and can find the process of accessing the criminal justice system to be intimidating.
6. The Bar would query whether more could still be done to ensure that current laws are being properly implemented to protect victims of domestic abuse. Are the police, PPS and courts using the laws which are already in existence effectively to ensure that perpetrators are being charged and convicted for violent behaviour and evidence of physical assault? Evidence from practitioners suggests that difficulties can be encountered in securing convictions in domestic violence cases involving physical violence given the nature of the relationships involved. Consequently, how will the justice system, including police, PPS, judiciary and juries, be equipped to interpret an additional complex concept like coercive behaviour?

**2. Should the law be strengthened, for example, to include a specific domestic abuse offence that captures patterns of coercive and controlling behaviour in intimate relationships?**

7. The Bar notes the launch of the new 'Stopping Domestic and Sexual Violence and Abuse' Strategy by the DOJ and DHSSPS in March 2016 which redefines domestic violence and abuse as:

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*'threatening, controlling, coercive behaviour, violence or abuse (psychological, virtual, physical, verbal, sexual, financial or emotional) inflicted on anyone (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability) by a current or former intimate partner or family member.'*

8. We believe that the inclusion of controlling and coercive behaviour in this definition is worth further consideration given that the drafting of an offence to capture this conduct is not without difficulty. The consultation document notes that controlling behaviour is described as a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour. Meanwhile coercive behaviour is described as an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten a victim.
9. The Bar appreciates the reasons for considering further legislation to combat domestic abuse. However, we would query whether the criminal process is always the appropriate method for dealing with some of the wider aspects of the domestic and social problems referenced in this consultation. Success will ultimately depend on achieving changes in individual attitudes and behaviour alongside the wider social culture in NI. This is recognised in the 'Stopping Domestic and Sexual Violence and Abuse' Strategy published by DOJ and DHSSPS in March 2016 which outlines a range of priorities focusing on prevention and early intervention aimed at preventing abuse, supporting victims and delivering change through responsive specialist multi-agency services.
10. We would also query whether there could be unintended consequences from changing the law by the introduction of a specific domestic abuse offence covering coercive and controlling behaviour in intimate relationships. Would police officers end up treating coercive control as a separate, less serious category of offence and perpetrators being undercharged even for physical offences? Furthermore, what would be put in place to enable frontline professionals, such as social workers, teachers and healthcare staff, to recognise behaviour that constitutes coercive control that might be used as evidence in a case?

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## 3. How would any changes be practically implemented?

11. The Bar notes that the offence of controlling or coercive behaviour was introduced in England and Wales under the Serious Crime Act 2015. The offence carries a maximum sentence of 5 years' imprisonment, a fine or both. This offence is constituted by behaviour on the part of the perpetrator which takes place "repeatedly or continuously". The victim and alleged perpetrator must be "personally connected" at the time the behaviour takes place. The behaviour must have had a "serious effect" on the victim meaning that it has caused the victim to fear violence will be used against them on "at least two occasions" or it has had a "substantial adverse effect on the victims' day to day activities". The alleged perpetrator must have known that their behaviour would have a serious effect on the victim, or the behaviour must have been such that he or she "ought to have known" it would have that effect.
12. In addition, we believe that the definition of controlling and coercive behaviour and the sub-categories of behaviour types flowing from this will require careful practical consideration if any domestic abuse offence is to be introduced in NI. Consequently, the types of behaviour associated with coercion and control must be specified and defined in order to enable a defendant to respond to any criminal charge and there is a risk that these could be regarded in a subjective fashion. For example, the Home Office's Statutory Guidance Framework on 'Controlling or Coercive Behaviour in an Intimate or Family Relationship' details a range of these behaviours, including isolating a person from their family and friends, monitoring their time, depriving them of their basic needs and financial abuse. However, this is not an exhaustive list meaning that other factors could potentially be taken into account by the PPS when deciding whether a criminal offence has taken place.<sup>2</sup>
13. Furthermore, using the criminal law to deal with controlling and coercive behaviour will necessarily have to involve some harmful element which has had a demonstrable impact on a victim. In the absence of physical violence and injury, there must be some form of psychological harm which may be difficult to identify if it falls short of a medical diagnosis. It is likely that there will rarely be objective and independent proof of these complaints and therefore it will rely on the

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<sup>2</sup> Home Office, 'Statutory Guidance Framework: Controlling or Coercive Behaviour in an Intimate or Family Relationship', December 2015, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/Controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf) (last accessed 22 April 2016)

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victim's evidence. For example, in England the statutory guidance points out that the pattern of controlling behaviour must have caused the victim to fear that violence will be used against them on "at least two occasions" or it has had a "substantial adverse effect on the victim's usual day-to-day activities". This can include the victim stopping or changing the way they socialise, physical or mental health deterioration, a change to their routine at home including those associated with mealtimes or household chores, the victim putting in place measures in their home to safeguard themselves or their children, changing working patterns, employment status or routes to work.

14. The Bar takes the view that some of these factors which show a "substantial adverse effect on the victim's usual day-to-day activities" may be difficult to identify as evidence of controlling or coercive behaviour for use in a courtroom. We would query how a victim will be able to demonstrate this and whether it will be necessary for any abuse to be documented over the course of a relationship to demonstrate that the perpetrator's behaviour had an adverse effect. A further potential difficulty will be the proof that any such harm has been caused by the abusive behaviour rather than having alternative causes.
15. Proving a criminal case against an individual must also necessarily involve some element of a perpetrator's intention as to the conduct and knowledge of the damaging consequences. We would be concerned that defining and proving this mental element could be more difficult than in cases of physical violence. In England the statutory guidance points out that the perpetrator "knows or ought to know that it will have a serious effect on the victim". The use of "ought to know" means that a reasonable person in possession of the same information would know the impact of their behaviour on the victim. However, it is worth noting that there will be some instances in which the perpetrator may have psychological problems contributing to the cause of the abusive conduct which may need to be taken into account.
16. Furthermore, we also consider that the Department should give greater consideration to the outcomes of the implementation of this offence in England and Wales. No statistics on the number of prosecutions under the new law have been made available to date from the CPS and there is no caselaw as yet. We believe that it would be advantageous for the Department to monitor the operation of the new offence in England and Wales before it is introduced in Northern Ireland.

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17. Finally, the perception of the Bar is that difficulties involved in prosecuting allegations of domestic violence tend to arise from the unwillingness of many complainants to pursue their complaints to the stage of a criminal trial for a variety of reasons, including the process of accessing the justice system. This is only likely to be compounded by some of the difficulties associated with identification and proof of this controlling behaviour by the PSNI and PPS and the anticipated nature of any trial. Asking a court to adjudicate on the exchanges of allegations, explanations and excuses from a perpetrator before passing judgement on behaviour constituting criminal guilt in the context of an entire relationship possibly spanning years will be a difficult task. Consequently, if this offence is to be introduced it will be necessary for the parties involved in any such a case to have access to quality legal advice and representation.

## Conclusion

18. In summary, the Bar is supportive of attempts to offer help and protection to victims of domestic abuse. We welcome the ambitions of the DOJ and the DHSSPS reflected in the new 'Stopping Domestic and Sexual Violence and Abuse' Strategy, particularly in relation to prevention and early intervention and further work around responsive multi-agency services. However, we believe that there are a number of issues around how the criminal justice system would deal with a new offence of domestic abuse linked to controlling and coercive behaviour which the DOJ must address before making this change to the law.